



DENEL GROUP

Tel: +27 12 671 2758

Fax: +27 12 671 2833

Email: ZwelakheN@denel.co.za

Ref: Ltr/NT/Denel/VR Laser Asia/13Apr16

18 April 2016

DIRECTOR-GENERAL
National Treasury Pretoria
2016 -04- 22
Ref No:
Received by: H. Maphangwa

Mr Ismail Momoniat
Acting Director-General
National Treasury
Private Bag X115
PRETORIA
0001

Dear Mr Momoniat,

JOINT VENTURE BETWEEN DENEL SOC LTD AND VR LASER ASIA

The meeting of the 15th April 2016 between Denel SOC Limited and National Treasury regarding the approval status of the recently established Denel Asia joint venture has reference.

We are always appreciative of engagements of this nature as it is our strong belief, as supported by the constitution that organs of the state should never have to deal with one another through the media but endeavour to resolve issues amongst themselves.

To avoid any potential misunderstanding and as part of the normal governance processes, we deemed it necessary that we reduce the key elements of our discussion into writing considering that this meeting is only the start of a process to still unfold.

I have attached our transcription as per our understanding of the key discussion and decisions taken in that meeting. I humbly request that you review this attachment and please revert back to me should you wish to add any elements you might view as significant as per our discussion.

Please do not hesitate to contact me should you require any further information.

Yours faithfully

Zwelakhe Ntshepe
GROUP CHIEF EXECUTIVE OFFICER (ACTING)

cc. Mr Lungisa Fuzile – Director General: National Treasury
Mr Mogokare Richard Seleke – Director General: Department of Public Enterprises
Mr Odwa Mhlwana – Acting Group Chief Financial Officer: Denel

Denel SOC Ltd, Reg No 1992/001337/30, Nellmapius Drive, Irene
P O Box 8322, Centurion, 0046, South Africa. Tel: +27 (0)12 671 2700, Fax: +27 (0)12 671 2751
Directors: Mr L D Mantsha (Chairman), Mr R Saloojee (Group Chief Executive Officer), Ms M Kgomongwe, Mr T D Mahumapelo,
Ms P M Mahlangu, Ms N Mandindi, Mr Z Mhlonfo, Ms R Mokoena, Mr N J Motseki, Mr T J Msomi, Lt Gen T M Nkabinde (ret),
Ms K P S Ntshavheni,

Executive Director
Group Company Secretary: Ms EM Africa

SE

LF

**EXTRACT OF THE MEETING HELD ON THE 15TH APRIL 2016 STARTING AT 14H30 BETWEEN
NATIONAL TREASURY (NT) AND DENEL SOC LIMITED (Denel).**

VENUE: Pretoria – National Treasury Building at 40 Church Street.

ATTENDEES: Zwelakhe Ntshope -Denel Group Chief Executive Officer (Acting)
Odwa Mhlwana – Denel Group Chief Financial Officer (Acting)
Ismael Momoniat – Acting Director General - National Treasury
Other National Treasury Officials (Please fill in the names)

SUBJECT: Following the recent media statements suggesting that Denel might have violated the PFM act 1 of 1999 in its endeavours to establishing Denel Asia (Joint Venture between Denel SOC Limited and VR Laser Asia), the meeting was to discuss how Denel it is that Denel believes that no law was violated when NT had not provided specific approval to the transaction in terms of section 51(g) and 54(2) of the PFMA.

EXTRACT: Mr Momoniat, opened the meeting with an introduction that highlighted the following:

1. It is not NT's intention to deal with other organs of state through the media, however given that this specific issue was deemed to be of public interest as well as the media enquiries received by NT on this issue since the media launch by Denel of its Asia joint venture on the 28th January 2016, A media statement was issued by National Treasury on the 14th April 2016.
2. NT's statement was not saying that Denel had violated any act but carefully crafted in response to the media releases observed in the past both from Denel and DPE given that no approval had been given by NT, that Denel MIGHT have violated the act, stating the process to be followed in the event that this was to be proven. This meeting is thus a first step to establishing whether the PFMA has been violated or not.
3. Emphasised the fact that NT has special powers (no specifics of what powers) to act against organs of state that violated governance prescripts.
4. Requested Denel to explain its actions as it relates to whether approvals had been granted or not regarding this Asia Joint Venture.

Mr Ntshope started articulating Denel's historic involvement in Asia with specific emphasis on India as follows:

1. Denel had been out of India for about 13 years, blacklisted on allegations of misconduct with regards to its partnerships in that market

LF -

SE

which were later (around February 2016) thrown out of court and Denel cleared.

2. At the time, prior to being blacklisted, Denel spent in the region of R350m on business development activities for which no return was ever realised on such investment.
3. Emphasised the importance of the Indian market to Denel's growth strategy and the fact that after the USA, India is the next biggest defence market globally.
4. That at the time Denel got Clearance and lifting of the blacklisting, there were major opportunities which Denel had to play catch up on urgently to stay in the race to winning the contracts with very limited time.
5. India's Defence rules specifically require that defence articles are "Made" in India thus eliminating an opportunity of Denel selling directly from RSA into India.
6. Emphasised that VR Laser South Africa is a business that Denel had business dealings with for a very long time (+/- 10 yrs) and that this business is now under new ownership that found the business relationship already in existence between VR Laser RSA and Denel.
7. Introduced Mr Mhlwana to take the meeting through the governance element of the transaction.

Mr Mhlwana went on to explain the compliance regime that governed the transaction and how Denel obtained compliance assurance.

1. Two sections of the PFMA as well as the conditions to the approval of the government guarantee issued to Denel, were considered in progressing through this transaction and these pieces emphasised the following
 - a. In essence, Section 54(2) required that this transaction be subject to the approval by the executive authority with notification of the National Treasury. This section further stipulates that if no response is received from the executive authority in 30 days, the applicant may deem the application as approved.
 - b. In essence, Section 51 (1)(g) required that the National Treasury be notified of this transaction and be granted reasonable time to provide its approval.
 - c. The condition to the approval of the government guarantee issued to Denel required that for all S54(2) approval requests, National Treasury is not only informed/notified but is also an approver similar to the executive authority.

SE

LF.

2. The governance compliance regime in concluding the formation of Denel Asia was explained in detail to the National Treasury Officials highlighting the following:
 - a. Section 54(2) as it relates to the approval by the executive authority and notification of the National Treasury was fully complied with given the expiry of the 30 day period as stipulated in the act.
 - b. Section 51(1)(g) as it relates to the reasonable time to be afforded to National Treasury in seeking their approval was also complied to fully given that this section read together with section 54(2) does provide clear guidance on how long the reasonable time is which National Treasury has to provide its approval decision. Denel Stressed the fact that the 30 day period expired on the 12th of January 2016 with the joint venture only established on the 29th January 2016 and that during this time no response was ever received from National Treasury.
 - c. The approval condition to the government guarantee elevated National Treasury to approval status in line with the executive authority in all matters relating to section 54(2) approval requests. This was therefore complied to fully as stipulated in (a) above.
3. National Treasury's reaction to Denel's position articulated in 2 above was as follows:
 - a. Further meetings with the National Treasury Director General on his return are necessary as well as a separate meeting with the Minister of Finance attended amongst others by Denel's executive authority and the chairperson of the board will be necessary to discuss this matter further. These meetings will be arranged by National Treasury urgently.
 - b. All future media statements on the matter to be co-ordinated between the National Treasury, Denel and DPE.
 - c. A letter to Denel will be issued on Monday, requesting additional information on the transaction for National Treasury to review the PFMA application and make their final decision
 - d. That Denel Freeze/put on hold all business operations of the Joint Venture until National Treasury issues their decision on the PFMA application
 - e. Strong concerns on Denel's legal interpretation as stipulated in 2(b) above. National Treasury's submission was that there is

SE

LF.

case law on the definition of reasonable time and that it constitutes taking strong consideration of the specific circumstances such as the December holidays, historic time taken by National Treasury in approving similar applications.

Other than the notion that Denel freezes all operations of Denel Asia and that the joint venture is not valid and all operations must wait for a another review process, point (a) and (b) above was agreed to by Denel. Denel's position as articulated in point 2 above remains and that the transaction is valid and Denel has fully complied with all legislative requirements.

SE

LF



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001 - Tel (+27 12) 315 5111 - Fax (+27 12) 323 1783

Mr. Z Ntshepe
Acting Chief Executive Officer
Denel SOC Ltd
P O Box 8322
PRETORIA
0001

DENEL'S APPLICATION IN TERMS OF SECTION 51(g) AND 54 OF THE PUBLIC FINANCE MANAGEMENT ACT ("PFMA") FOR THE ESTABLISHMENT OF DENEL ASIA SOC LIMITED

The abovementioned matter refers.

The National Treasury would like to express its appreciation and gratitude to the acting CEO and the acting CFO ("the executives") of Denel SOC Ltd for availing themselves at short notice for the urgent meeting with the Acting DG: Mr. Ismail Momoniat and the National Treasury team on Friday 15 April 2016. The National Treasury further acknowledges Denel's letter dated 18 March 2016, the contents of which is still being reviewed. The National Treasury may respond thereto at a more opportune time.

The National Treasury would like to confirm that:

- 1 The purpose of the aforementioned meeting was to clarify the status of the PFMA application made by Denel on 11 December 2015;
- 2 The National Treasury advised the executives present that the application was still under consideration and that no approvals by the National Treasury had been granted as yet;
- 3 The National Treasury differed with Denel's interpretation of the law (as stated by the two executives) which had led Denel to assume that the application was approved after the expiry of 30 days;
- 4 The National Treasury is of the view that there was no compliance with the provisions of the PFMA, in particular section 51((1)g) thereof in that no decision has been taken by the National Treasury in terms of the aforementioned section;

SE LF

- 5 The National Treasury proposed that a follow up meeting to determine a way forward be urgently convened on Tuesday, 19 April 2016; and
- 6 The National Treasury will proceed with its consideration of the application.

In order for the National Treasury to properly assess the application, Denel is requested to submit the following:

- (a) Denel's previously incurred millions of Rands in losses with no formal blacklisting in force and the entity's re-entry into the Indian market appears to be based on a verbal notification from the Indian Embassy. Provide clarity on how this regulatory risk will be managed going forward;
- (b) The procurement process that was followed in order to identify VR Laser Asia as the preferred partner as well as the assessment of other potential partners that were considered;
- (c) Clarity on the track record and ownership of VR Laser Asia and its capacity to contribute to assisting Denel in securing business in Asia;
- (d) The valuation and rationale that informed the proposed shareholding structure of the JV: Denel Asia;
- (e) Clarity regarding the funding source(s) post the 5 year period, including written confirmation that VR Laser Asia shall not have recourse to Denel in the event the JV is unsuccessful within the first 5 years as stated in the application;
- (f) Clarity on whether the JV would have the exclusive right to market Denel products in the targeted countries;
- (g) Detailed financial projections for each of the respective years, which would include, but not limited to:
 - i. Projected Financial performance, Positions and Cash-Flow, including assumptions driving the projected performance and cash-flows;
 - ii. Projected management accounts and assumptions for all capital and operational expenditure;
 - iii. Net Present Value (NPV) calculations and assumptions for any capital assets to be acquired (if any);
 - iv. Accounting policies to be adopted for the JV, including how Denel's Intellectual Property will be recognised, measured and disclosed in the accounting records of the JV;
 - v. Dividend policies relating to the JV;
- (h) Additional information pertaining to competitive landscape, business strategy and marketing plan;

SE

LF-


- (i) Information pertaining to the final decision between India and Hong Kong on the outstanding double tax agreement. Moreover, should India and Hong Kong fail to reach consensus on the matter, Denel should illustrate the impact of this scenario on the performance of the JV;
- (j) With respect to the Intellectual Property (IP) that belongs to other parties (Armstrong and third parties), has Denel engaged with the respective parties regarding the licencing of the IP? Should the parties not agree to licence their IP to the JV, does Denel have mitigating strategies in place to ensure that the operations of the JV are not negatively impacted;
- (k) Alternative options that Denel shall explore should VR Laser Asia reject Denel's Exit Clause: Termination of Convenience;
- (l) An overview of the strategies that Denel shall put in place to ensure that its operations and reputation are not compromised; and
- (m) Clarity on how the proposed transaction will impact on the existing corporate plan.

In addition to providing this information, Denel is requested to avail itself for engagements on the PFMA application with the designated officials of the National Treasury should these be required. The information already submitted in response to the letter of 5 February 2016 from the Chief Director: Supply Chain Management Governance, Monitoring and Compliance is acknowledged.

Please note that, pending a decision on whether to approve or not, Denel may not proceed with the Joint Venture. For this reason, the National Treasury requested that whilst the application is under consideration, all operations under the Joint Venture be ceased with immediate effect pending the National Treasury's decision. The aim is to limit the negative consequences which may arise from potential non-compliance with the PFMA. Kindly confirm as a matter of extreme urgency whether the operations have been ceased as requested.

I trust that the above is in order.

Kind regards



ISMAIL MOMONIAT

ACTING DIRECTOR-GENERAL

DATE: 18-4-2016

cc. Mr MR Seleke
Director-General: Department of Public Enterprises

SE

LF



DENEL GROUP

Tel: +27 12 671 2758
 Fax: +27 12 671 2833
 Email: ZwelakheN@denel.co.za
 Ref: Ltr/NT/Denel/VRLaserAsia/21Apr16

21 April 2016

Mr Ismail Momoniat
 Acting Director-General
 National Treasury
 Private Bag X115
 PRETORIA
 0001

Dear Mr Momoniat,

DENEL'S APPLICATION IN TERMS OF SECTION 51(g) AND 54 OF THE PUBLIC FINANCE MANAGEMENT ACT ("PFMA") FOR THE ESTABLISHMENT OF DENEL ASIA SOC LIMITED

Denel hereby acknowledges receipt of your letter dated 18 April 2016 regarding the matter referred to above.

Without prejudice to Denel's position on this matter as articulated in the meeting of the 15th April 2016, we are in the process of collating the information as requested in your letter and will be responding to this fully as a matter of urgency.

We would like to clarify a few of those questions to ensure that our response is addressing your specific issues:

- | | |
|------------------------|---|
| Question (a) | Please clarify what "regulatory risk" referred to in this questions relate to? |
| Question (g)(iii)&(iv) | Please confirm how the information requested in these two questions will assist the department in its evaluation of the application. |
| Question (h) | Please specify what additional information you are looking for in this question. |
| Question (i) | Please provide us with details on the "pending final decision" on double tax agreement between India and Hong Kong as referred to in this question. |

Denel SOC Ltd, Reg No 1892/001337/30, Nalmaplus Drive, Irene
 P O Box 8322, Centurion, 0046, South Africa. Tel: +27 (0)12 671 2700, Fax: +27 (0)12 671 2761
 Directors: Mr L D Mantsha (Chairman), Mr R Saloojee¹ (Group Chief Executive Officer), Ms M Kgomongoe, Mr T D Mahumapelo,
 Ms P M Mahlangu, Ms N Maredini, Mr Z Mhlontlo¹, Ms R Mokoena, Mr N J Motsaki, Mr T J Msomi, Lt Gen T M Nkabinde (rtd),
 Ms K P S Ntshavheni,

¹Executive Director
 Group Company Secretary: Ms E M Africa

SE LF

Please do not hesitate to contact me should you require any further information.

Yours faithfully

9.9. [Signature]

Zwelakhe Ntshope
GROUP CHIEF EXECUTIVE OFFICER (ACTING)

cc. Mr Lungisa Fuzile - Director General: National Treasury
Mr Mogokane Richard Seleke - Director General: Department of Public Enterprises
Mr Lugisani Daniel Mantsha - Chairman of the Denel Board
Mr Odwa Mhlwana - Acting Group Chief Financial Officer: Denel

Company Confidential

SE ²EF



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001 Tel: +27 12 315 5904 Fax: +27 12 328 5145

Mr Z Ntshope
Group Executive Officer (Acting)
Denel SOC Ltd (Denel)
P O Box 8322
PRETORIA
0001

Dear Mr Ntshope

DENEL'S APPLICATION IN TERMS OF SECTIONS 51(1)(g) AND 54 OF THE PUBLIC FINANCE MANAGEMENT ACT (PFMA) FOR THE ESTABLISHMENT OF DENEL ASIA SOC LIMITED

1. I refer to your letter dated 21 April 2016, in respect of the abovementioned matter.
2. In terms of your letter, you seek clarification on certain issues raised in our letter dated April 2016.
3. In light of the urgency of this matter and our discussions held at the meetings of 15 and 16 April 2016, I had indicated that matters on clarification should be dealt with expeditiously through liaising with the relevant official/s. Nevertheless, I am taking the time to acknowledge your letter formally.
4. The additional information relating to the matters where you requested clarity is outlined below.


Questions raised by Denel:	National Treasury response:
Question (a): Please clarify what "regulatory risk" referred to in this questions relate to?	Clarity on how Denel will ensure that the Joint Venture will meet all regulatory requirements both in India and Hong Kong to mitigate against the possibility of financial losses being incurred similar to those Denel realised when it was blacklisted in India during 2005. In particular, Denel should provide clarity on whether the company has written confirmation regarding the lifting of the blacklisting in India enabling the company's re-entry into the Indian market.
Question (h): Please specify what additional information you are looking for in this question.	In the application, Denel highlighted that one of the reasons for establishing the Joint Venture was to leverage VR Laser Asia's marketing network. However, the due diligence conducted by ENSAfrica indicated that it was unable to comment on the ability of VR Laser Asia to establish business links/relationships in Asia. Additionally, the due diligence report highlighted that VR Laser Asia is a shell company that is yet to commence trading. Denel should detail VR Laser Asia's knowledge of Asia's competitive

EF

Questions raised by Denel:	National Treasury response:
	landscape, its networks and experience operating in the Asian market. Furthermore, Denel should give an indication on how the expertise of VR Laser and its marketing networks in particular will contribute to Denel delivering on this strategy to compete and market itself successfully in the Asian market.
Question (i): Please provide us with details on the "pending final decision" on the double tax agreement between India and Hong Kong as referred to this question.	In the PFMA application, Denel has stated that there are discussions between India and Hong Kong with respect to a double tax agreement. Denel should provide clarity on whether the two parties have reached consensus with respect to this matter and the potential implications on the performance of the Joint Venture should the countries fail to reach consensus.

5. The detailed financial information is required to evaluate the impact that the proposed subsidiary could have on Denel given that it will need to be consolidated in the company's financial accounts. This is in line with the information requirements set out in the Practice Note on Applications under Section 54 of the PFMA by Public Entities which was shared with you during the meetings. As I highlighted, the Practice Note outlines the information to be included in Section 54 and Section 51 applications. Until all the required information has been submitted the National Treasury cannot properly assess the applications and make a decision.
6. I appreciate your commitment to collating and submitting the required information.

I trust that you find the above in order.


LUNGISA FUZILE
DIRECTOR-GENERAL
DATE: 26/4/2016

SE

LF.

Mercy Magadze

From: Avril Halstead
Sent: 20 May 2016 09:23 AM
To: Mercy Magadze
Subject: FW: Denel's PFMA application: Denel Asia
Importance: High

From: Lungisa Fuzile
Sent: 11 May 2016 06:42 PM
To: odwam@denel.co.za
Cc: Avril Halstead; Anthony Julies; Ismail Momoniat
Subject: Denel's PFMA application: Denel Asia
Importance: High

Dear Odwa,

It is just about two weeks since our meeting. As I had incited at the meeting, I believe we have the ability to resolve most challenges including the one relating to Denel's application. In this regard, it is important to keep the channels of communication between our institutions open. Notwithstanding media reports to the contrary, National Treasury would still like to work with Denel to resolve this matter in a way that protects the reputation of both institutions and government as a whole.

Following on from the meetings of 15 and 19 April 2016 between National Treasury and Denel, Denel was requested to provide additional information with respect to the Section 51(1)(g) and Section 54 applications. Further information was provided to Denel on the additional information requirements in the letter dated 26 April 2016.

As indicated in the meetings, National Treasury is still committed to fast-tracking consideration of the application. Indeed, most of the information requested is standard in relation to applications of this kind. It is intended to enable the Treasury to evaluate the likely financial impact of the proposal. In addition to making sure that the proposed deal/structure is in full compliance with all relevant statutes and regulation, such an evaluation is even more important in the case of Denel given the guarantees government has extended to the company to enable it to maintain its going concern status.

It was our understanding that there was urgency on Denel's side to resolve this matter quickly. Moreover, given the media attention that this transaction is continuing to receive, there is a need to swiftly conclude on this matter.

Without the additional information being provided, the National Treasury will not be in a position to comprehensively assess all aspects of the application before reaching a decision. After checking with my colleagues on the progress since our last meeting I was somewhat perturbed to learn that we are not very far from where we

were the last time we met. This left me very concerned. In the spirit of cooperation, I am following up to find out when we can anticipate receiving the information. Are there perhaps some unanticipated obstacles that have been encountered? If such exist please advise me so that I can assist with resolving them.

Yours

Lungisa Fuzile



**MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA**

Private Bag X115, Pretoria, 0001, Tel: +27 12 323 8911, Fax: +27 12 323 3262
PO Box 29, Cape Town, 8000, Tel: +27 21 464 6100, Fax: +27 21 461 2934

Ref. M4/1/4 (2335/15)

Mr LD Mantsha
Chairman of Denel
P O Box 8322
CENTURION
0046

Dear Mr Mantsha

**FORMAL REQUEST FOR INFORMATION IN TERMS OF SECTION 54(1) OF THE
PUBLIC FINANCE MANAGEMENT ACT WITH RESPECT TO THE FORMAL
APPLICATION FOR APPROVAL IN TERMS OF SECTION 51(1)(g) OF THE PUBLIC
FINANCE MANAGEMENT ACT 1 OF 1999 – PROPOSED ESTABLISHMENT OF DENEL
ASIA**

I refer to your correspondence dated 10 December 2015 regarding the above mentioned matter.

Notwithstanding media reports to the contrary, government would like to work with Denel to resolve this matter in a way that protects the reputation of both the institution and government as a whole. This is especially important at a time when the country is under such close scrutiny, inter alia by rating agencies. A downgrade in the sovereign credit rating would have negative repercussions for government's capacity to deliver on its objectives to promote growth, development and job creation.

I am informed that two meetings have taken place on 15 and 19 April 2016 between the Denel executives and the National Treasury officials in an effort to resolve issues pertaining to the application. At these meetings, Denel confirmed that Denel Asia was established on 29 January 2016. Denel explained its position stating that it has fully complied with all legislative requirements and that the transaction is valid. Denel indicated that it had assumed that approval had been granted with respect to the application in terms of Section 54(2) of the Public Finance Management Act (PFMA) following the expiry of the 30 day period, as provided for in Section 54(3) of the PFMA. With respect to the Section 51(1)(g) application, Denel indicated that the 30 day period specified under Section 54 had been taken as guide of the reasonable time to be afforded to the National Treasury in reaching its decision on the application in terms of Section 51.

However, the National Treasury officials advised the executives that they do not concur with Denel's interpretation of the relevant sections of the PFMA and hold the view that there was not compliance with its provisions.

SE LF.

The application in terms of section 51(1)(g) and Section 54(2) of the PFMA is under consideration and no approvals have been granted.

The conditions attached in terms of Section 70(1) of the PFMA to the R1.85 billion guarantee that has been issued to Denel included a requirement that "Any transactions undertaken in terms of Section 54 of the PFMA are subject to approval of the Minister [of Finance] as well as the Minister of Public Enterprises". I have been advised that the conditions create a distinct legal obligation on Denel to obtain both Ministers' approval prior to entering into the types of transactions envisaged in Section 54(2) of the PFMA. Moreover, the deeming provision contained in Section 54(3) of the PFMA is not imported.

In terms of Section 51(1)(g) of the PFMA, the period that constitutes a reasonable time depends on the circumstances of each case, which in this case included, amongst others, the following:

- On 10 December 2015, a new Minister was appointed;
- By 13 December 2015, that Minister was replaced by another;
- As a result thereof, the markets were affected and the Minister and the National Treasury had to concentrate their efforts on restoring market confidence;
- The National Treasury closed during the Christmas and New Year period and its staff were on vacation; and
- January and February are the busiest months for the Minister and the National Treasury because of the budget preparations.

In light of the above, a reasonable period could not be assumed to be the 30-day period envisaged in Section 54 of the PFMA. Moreover, there is no assumption of deemed approval incorporated into Section 51 as is provided for in Section 54: a decision from the National Treasury is required prior to the formal establishment of a company. In any event, in the spirit of cooperating in mutual trust and good faith, Denel should have contacted the National Treasury to ascertain the status of its application rather than assume that approval was granted.

The National Treasury officials informed Denel that they would proceed with consideration of the application and that in the meanwhile, all operations of Denel Asia should be ceased pending the decision. Denel was requested to submit additional information which was specified in a letter dated 18 April 2016. On 26 April 2016, the National Treasury responded to Denel's request for further clarity. As no response had been received from Denel by 11 May 2016, the Director-General of the National Treasury wrote to the Denel Chief Financial Officer enquiring about the delay and offering his assistance in resolving any unanticipated obstacles. Despite these several requests, Denel has failed to provide the information requested:

The information request is standard in relation to applications of this nature and is aimed at enabling the National Treasury to comprehensively assess the application, including evaluating the financial impact of the proposal, assessing whether any risks might arise from the transaction and that appropriate mitigations are in place, and ensuring that there is full compliance with all relevant statutes and regulations. Such an evaluation is especially important in the case of Denel given the guarantees which government has extended to the company to enable maintain ensure of its going concern status. Several rating agencies

SE

LF-

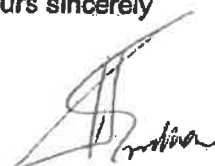
have highlighted government's contingent liability exposure to state owned companies as a risk for the sovereign credit rating.

I understand that the Denel executives underlined the importance of the Indian market for Denel's growth strategy and that there was urgency to re-enter the market in time to position the company for upcoming defense contracts. Moreover, given the negative media attention that this transaction is continuing to receive, there is a need to swiftly conclude this matter. The National Treasury is committed to fast-tracking consideration of the application but requires the additional information from Denel to complete a comprehensive assessment.

In view of the urgency of this matter and taking into account the time that has already elapsed, the National Treasury hereby formally requires, in terms of Section 54(1) of the PFMA, that the Board of Denel submits all the information that has been requested by no later than 31 May 2016. In the event that the Board fails to submit the information, the Board as the accounting authority of Denel, will be in breach of its duties under the PFMA and must report its inability together with its reasons for failing to comply by no later than 28 June 2016.

I trust that you will find the above in order.

Yours sincerely



PRAVIN J GORDHAN, MP
MINISTER OF FINANCE

Date: 10-06-2016

SE LF.



DENEL GROUP

Tel: +27 12 671 2700
 Fax: +27 12 671 2751
 Email: ZwelakheN@denel.co.za
 Ref: Ltr/NT/Denel/VR Laser Asia/

14 July 2016

Mr Lungisa Fuzile
 Director-General
 National Treasury
 Private Bag X115
 PRETORIA
 0001

Dear Mr Fuzile,

JOINT VENTURE BETWEEN DENEL SOC LTD AND VR LASER ASIA

Your letters dated 18th and 26th April 2016 have reference.

We would like to draw your attention to the discussions previously held with you during the two meetings held with you and your team as well as all written communication to yours and the minister's office from both myself and our board chairman, wherein we made the fact that the establishment of Denel Asia was arrived at after duly following the relevant prescripts of the PFMA act.

Both your letters referred to above are requesting further information, purporting that such information will assist your office in evaluating Denel's application in terms of S51(g) and 54 of the PFMA towards a decision on whether to approve or not, the establishment of Denel Asia joint venture. I would like to put it on record that in Denel's view the approval process has been concluded as allowed for by the PFMA and thus provision of any information on the establishment of Denel Asia is purely for information purposes and not for any approval process.

Appendix A attached hereto provides additional information as requested in your letters.

Yours faithfully

Zwelakhe Ntshepe
 GROUP CHIEF EXECUTIVE OFFICER (ACTING)

cc. Mr Mogokare Richard Seike - Director General: Department of Public Enterprises
 Mr Odwa Mhlwana - Acting Group Chief Financial Officer: Denel

Denel SOC Ltd, Reg No 1992/001337/30, Nellmapius Drive, Irene
 P O Box 8322, Centurion, 0046, South Africa. Tel: +27 (0)12 671 2700, Fax: +27 (0)12 671 2751
 Directors: Mr L D Mantshe (Chairman), Mr R Saloojee (Group Chief Executive Officer), Ms M Kgomongoe, Ms P M Mahlangu,
 Ms N Mandindi, Mr Z Mhlontri, Ms R Mokoena, Mr N J Motseki, Mr T J Msomi, Lt Gen T M Nkabinde (rd), Ms K P S Ntshavheni

¹Executive Director
 Group Company Secretary: Ms EM Africa

SE UF

APPENDIX A

	Response
Question (a)	The re-entry into the Indian market is not based on "verbal" notification but on a "note verbale" See Appendix B. The fact that Denel holds 51% equity on the joint venture allows for Denel governance policies which had been updated since our previous experiences in India, to be applicable to ensure that the associated risks are actively managed.
Question (b)	As a norm with establishment of international business partnerships, the process of identifying a suitable partner is not a procurement process. Example to this is the Joint venture we have in UAE, Tawazun was the only potential partner considered. In this particular joint venture, a few potential industrial partners were considered and due to the late start we had in the race, these players had already partnered with global Original Equipment Manufacturers in competition with Denel. These potential partners considered are Bharat Forge and Larsen and Turbo discussed in section 5.4 of the PFMA application submitted.
Question (c)	Section 5.5, 5.6, 6.1 and 6.2 of the PFMA application provides a complete answer to this question.
Question (d)	Denel Asia is a start-up company and therefore the shareholding structure is not based on any valuation but the to enforce Denel's governance processes and manage the risks identified during the due diligence process, is was non-negotiable that Denel holds at least 51% equity in the venture. The value add by VR Asia is the business development funding of the R100m, Industrial networks in the region as well as the links to the steel cutting, bending and fabrication capability.
Question (e)	<ul style="list-style-type: none"> Paragraph 16.2 of the "Subscription and Shareholders Agreement" is the written confirmation that there will be no recourse to Denel from VR Asia in respect of the loans to the Joint venture in the event of the JV being unsuccessful. Post 5 years, if the business is successful in securing contracts, will be funded through commercial banking lines. Amongst the Denel board's conditions in approving the venture was the fact that the venture cannot be funded out of Denel and engagements should be held with VR to fund the business even beyond the agreed R100m and beyond the 5 year period. Should the business be unsuccessful in securing contracts, the parties can agree to wind down the business.
Question (f)	Yes, the JV will have exclusive rights to market in the region
Question (g)	Refer to Appendix C
	V – The dividend policy is contained in paragraph 15 of the "Subscription and Shareholders Agreement"
Question (h)	<p>All prominent defence players particularly in India are either in direct competition or already partnered with international OEM's and thus already positioned to compete and thus not available to partner with Denel. VR Asia owners have very strong non-defence industrial links into India which can be leveraged to further partner with adjacent industries for in country transfer of technology and manufacturing.</p> <p>VR's networks are tabulated in section 6.2 of the "PFMA application"</p>
Question (i)	Worst case scenario being that the 2 countries do not reach consensus on the DTA, the JV partners would individually benefit through subcontracts from the selling JV to supply either complete products, semi or completely knocked down kits on which full margins would be made and accept that to remain competitive, the JV would remain without necessarily making profit on profits (from subcontracting)

	Response
Question (j)	The establishment of a JV of this nature follows a precedence set a number of times before thus with well-established models behind it. No product whose IP belongs to a third party would be exploited without the consent of such third party and certainly compensation for such exploitation of IP. All imminent opportunities are for products whose IP is 100% owned by Denel.
Question (k)	Alternative option is the clause already agreed to that Denel's shareholder representing the Government of RSA directs Denel to cease being a shareholder on reasons of national security or otherwise
Question (l)	Denel has assumed the effective control of the venture, allowing application of all Denel policies related operations and reputation. The governance framework applicable to Denel will also be applicable to the JV including the internal audit assurance function.
Question (m)	<p>The impact of this JV to the current corporate plan will be all positive.</p> <p>As previously stated the JV will not be funded from Denel thus poised to instead provide the ever needed cash resources to Denel in two approaches:</p> <ol style="list-style-type: none"> 1. Denel subcontracted to supply either complete products, SKD's or CKD's. 2. Profit share and dividends from the JV. <p>The projected cash flows and profitability are reflected in section 12.4 and 12.6 of the PFMA application</p>

APPENDIX B

No. 311/2014

The High Commission of India presents its compliments to the Department of International Relations and Cooperation of the Republic of South Africa and has the honour to convey that in the matter relating to request for mutual legal assistance in the matter of Denel (Pty) Ltd., the concerned authorities in India have treated the matter as closed. Accordingly, the request for assistance in this case stands withdrawn. High Commission of India wishes to convey its deep appreciation for the cooperation extended by the South African authorities

The High Commission of India avails itself of this opportunity to renew to the Department of International Relations and Cooperation of the Republic of South Africa the assurances of its highest consideration.

Pretoria, 20



Department of International Relations and Cooperation
Government of the Republic of South Africa
Pretoria
[Attn: Mr. J. Young, Acting Director (South Asia)]

SE

LF

Company Confidential

APPENDIX C

NT INFORMATION REQUEST DENEL ASIA

ITEM 6(G) (I) AND (II) FINANCIAL PROJECTIONS, ASSUMPTIONS, CASH AND OPERATING COSTS

1. ASSUMPTIONS

- Sales are based on a probability matrix of the latest marketing intelligence (Annexure A). The opportunities listed come from market intelligence and studies done over the past 20 years during contract negotiations with various potential clients. The \$9.2bn opportunities has been tested and evaluated and \$5.9bn was regarded as a realistic number.
- Gross profit is projected at a level that is market competitive and realistic, based on competitor analyses and pricing proposals discussed with potential clients.
- Reasonable lead times assumed from order intake to sales dates based on past experience. This is required for the development of the large systems. The development cycle to completion is well known per product family within the group.
- Denel contribute the product and product knowledge. Denel has invested more than R500m on development and demonstrations over the past 20 years.
- The major value add on the contracts will be in the client's country to address offsets. The manufacturing of products will be done in the country where the contract is finalised.
- Joint Venture on a 51/49 shareholding (Denel 51%).
- The R100m investment from the Denel partner will fund the office operational cost for the first few years until sales pick up.
- The R100m investment will be a preferential and secured loan, which will be re-paid to the partner before any future profit sharing takes place.

2. FINANCIAL PROJECTIONS

R'm	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23	2023/24	2024/25
Sales	0	587	900	1,543	3,087	4,372	6,013	7,025	7,500
Gross Profit	0	117	180	309	617	874	1,203	1,405	1,500
Gross Profit %	0	20	20	20	20	20	20	20	20
Operational Cost	11	14	19	22	27	35	35	35	35
Labour	6	8	12	15	20	25	25	25	25
Marketing	3	4	4	4	4	5	5	5	5
Overheads	2	2	3	3	3	5	5	5	5
Additional Operating Cost to Cover Business Growth	50	46	54	55	127	184	266	316	340
Profit before Interest / Tax / Dividends	(61)	57	107	232	463	655	902	1,054	1,125

3. OPERATIONAL COSTS

This cost is based on foreign offices cost structures that are currently managed by Denel.

The annual operational costs consist mainly of salaries for the office personnel and will increase as more resources are needed to do project management and marketing.

The marketing costs would mainly be for travel and accommodation and direct marketing in the different countries where the opportunities lies.

The operational overheads will be to rent space and equipped the office with the necessary resources to operate effectively e.g. IT costs.

The additional operating costs would mainly be used to do big system demonstrations to the

SE

LF

Company Confidential

potential clients. Client country demonstrations typically cost between R10m to R20m. This is based on previous system demonstrations done in foreign countries.

4. CASH FLOW IMPACT

The first year cash shortfall would have to be financed from a one year short term loan at reasonable international rates, after this the business should be self-funded.

R'm	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23	2023/24	2024/25
Nett Operating Cash	(61)	57	107	232	463	655	902	1,054	1,125
Investment Capital	20	20	20	20	20				
Nett	(41)	77	127	252	483	655	902	1,054	1,125

ITEM 6(G) (III) NPV NET OF CAPITAL REQUIREMENTS

The joint venture company will facilitate the legitimate securing of contracts in the Asia-Pacific region. Denel Asia Management will adopt a risk sharing model which will entail Denel Asia entering into various joint venture companies in those primary and secondary target markets where the opportunities exists and subject to the local legislation in the different regions. In order to access opportunities in its primary target market, Denel Asia will partner with local industry partners initially contemplated in India but also in other primary and secondary target markets as required. It is therefore not envisaged that production and the resulting capital investment cost will be incurred in the Joint Venture. The expected cashflows net of investment is therefore projected as above.

ITEM 6(G) (IV) ACCOUNTING POLICIES AND INTELLECTUAL PROPERTY

The joint venture will be 51% owned by Denel and therefore subject to PFMA and Denel accounting policies.

No licence agreement has been finalised between the parties. Denel intends to be able to licence directly with the client where Denel Asia subcontracts Denel for transfer of technology. Alternatively Denel will enter into an agreement with Denel Asia that it will extend a licence agreement to Denel Asia to contract with the client directly if the client requires this. This is subject to client requirements and will be on a case by case basis. Denel will maintain full IP rights and will either licence to the client directly or to Denel Asia. There is to be no alienation of the IP to either Denel Asia or to the client.

5. In the PFMA application to DPE and Treasury, the following was indicated re INTELLECTUAL PROPERTY (IP) AND LICENCING:

"Technology transfer and protection of Denel's IP:

- (i) Denel will not alienate its Intellectual Property and technology transfer will be done by way of an applicable licencing agreement between relevant parties.
- (ii) Requisite approvals from Armscor and/or a third party will be obtained prior to licencing this IP.
- (iii) To the extent that royalties are payable to Armscor and/or any third party, Denel Asia will be required to effect such payment.
- (iv) Where Denel is the owner of the IP, there will be no royalty payable by Denel Asia as Denel is the technology partner bringing with it the technology to the joint venture... This is consistent with the Tawazun Dynamics joint venture model...
- (v) In instances where Denel cannot be subcontracted by Denel Asia for technology transfer to a local industry company in a specific jurisdiction, Denel Asia will instead be licenced with a right to extend such licence to an identified local industry company."

SE LF

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 20749/17

In the matter between:

DENEL SOC LTD

Applicant

and

MINISTER OF FINANCE

First Respondent

DEPARTMENT OF NATIONAL TREASURY

Second Respondent

ANSWERING AFFIDAVIT

I, the undersigned,

LUNGISA FUZILE

do hereby make an oath and state that:

A. INTRODUCTION

1. I am the Director-General in the Department of National Treasury, the second respondent herein ("**National Treasury**"). I am duly authorised to oppose this matter on behalf of the first and second respondents.
2. My primary responsibilities as Director-General of National Treasury include managing the department, producing a sound and sustainable national budget, managing government's financial assets and liabilities, overseeing government accounting policies and standards, regulating public sector procurement through

SE

LF

policy formulation, developing appropriate fiscal policy and financial management, and improving financial management throughout government.

3. I am therefore the appropriate person to depose to this affidavit.
4. The facts to which I depose are, except where the context indicates otherwise or I expressly say so, within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.
5. Any legal submissions that I may make are so made on the advice of the legal representatives of National Treasury and I believe them to be correct.
6. In this application, the applicant seeks an order declaring that:
 - 6.1. the applicant obtained approval *alternatively* is deemed to have obtained approval on 10 January 2016 and at least by 29 January 2016 from National Treasury for the conclusion and forming of the joint venture with VR Laser Asia by virtue of section 54(3) read with section 51(1)(g) of the Public Finance Management Act, 1 of 1999 ("the PFMA");
 - 6.2. the applicant acted in accordance and compliance with the provisions of section 51(1), 52(2)(a), 54(2)(b) and 54(2)(e) of the PFMA in concluding and forming the joint venture agreement with VR Laser Asia ("the JV Agreement"); and
 - 6.3. the applicant acted lawfully in concluding and forming its joint venture with VR Laser Asia in terms of the JV Agreement.

B. THE SCHEME OF THIS AFFIDAVIT

7. I have read the applicant's founding papers and propose to deal with it as follows:

SE

LF

- 7.1. Firstly, I shall set out the factual background to this matter;
- 7.2. Secondly, I provide a brief synopsis of the grounds on which this application is opposed;
- 7.3. Thirdly, I shall set out the relevant legislative framework in terms of section 51(1)(g) and section 54(2) of the PFMA for the establishment of a joint venture company. I shall show how the applicant's case fits within that legislative framework thereby demonstrating that:
 - 7.3.1. there was no approval or deemed approval for the conclusion and forming of the joint venture, Denel Asia Co. Ltd ("the JV"); and
 - 7.3.2. the applicant failed to act in accordance with the PFMA in concluding the JV Agreement and thus failed to act lawfully.
- 7.4. Finally, and to the extent necessary, I shall deal sequentially with the specific averments that the applicant makes in its founding affidavit.

C. SYNOPSIS OF THE RESPONDENTS' OPPOSITION

8. In summary, the respondents oppose this application on, amongst others, the following grounds:
 - 8.1. There is a material non-joinder in that the applicant ought to have joined the following parties who have a direct and material interest in the outcome of this application:
 - 8.1.1. The Minister of Public Enterprises;
 - 8.1.2. Denel Asia; and
 - 8.1.3. VR Laser Asia.

SE

L.F.

8.2. The legal position set out in section 51(1)(g) of the PFMA is clear and unambiguous. There can be no reasonable doubt about the proper interpretation of this section. In these circumstances, in exercising its discretion under section 21(1)(c) of the Superior Courts Act 10 of 2013, this Court should decline to grant the declaratory relief sought by the applicant;

8.3. The interpretation of section 51(1)(g) contended for by the applicant is clearly untenable:

8.3.1. The applicant provides absolutely no basis for contending that the words "a reasonable time" used in section 51(1)(g) should be interpreted to mean 30 days;

8.3.2. If the applicant's argument is that in this case, a reasonable time must be interpreted to mean 30 days, then the proper remedy open to the applicant was to approach a Court for an order compelling the Minister to decide the application. It is not competent for the applicant to appropriate unto itself the power to decide the application by purporting to invoke a non-existent deeming provision;

8.3.3. Even if, for the purposes of argument, one was to accept that "reasonable time" means 30 days, section 51(1)(g) quite plainly does not contain a deeming provision which deems that approval is granted after the expiry of the 30 days. Furthermore, the language used in the section does not permit this court to read such a deeming provision into section 51(1)(g). The only way in which this Court is empowered to read such words into the section is if this court finds that section 51(1)(g) is inconsistent with the Constitution. In such a case, this Court may exercise its constitutional remedial power to read words into the section to

SE

LF

cure the unconstitutionality. Given that the constitutionality of section 51(1)(g) is not an issue before this Court, this Court does not have the power to read words into the PFMA. To do so would infringe on the doctrine of separation of powers;

- 8.4. It is a condition of the government guarantee issued to the applicant that it has to get the explicit approval of both the Minister of Public Enterprises and the Minister of Finance in terms of section 54 of the PFMA. This has not happened. Hence the suspensive conditions to the agreement have not been met.

D. MATERIAL NON-JOINDER

9. In this application, the applicant seeks declaratory relief relating to the legality of the JV Agreement entered into with VR Laser Asia. On this basis alone, the applicant was obliged to join the other party to the agreement, VR Laser Asia, as a party to these proceedings.
10. At the heart of this case is the question of whether Denel Asia has been lawfully established. Denel Asia ought to have been joined as a party.
11. In order to succeed in obtaining the relief sought in its notice of motion, the applicant must demonstrate approval by the Minister of Finance as well as the Minister of Public Enterprises. The Minister of Public Enterprises ought to thus have been joined as a party.

E. FACTUAL BACKGROUND

12. The applicant is a state owned entity and was incorporated as a private company in 1992 in terms of the South African Companies Act, 62 of 1973. Its sole shareholder is the South African Government.

SE

5

13. On 30 October 2015, the applicant addressed a letter to National Treasury titled *"PFMA SECTION 54 (2) PRE NOTIFICATION: PROPOSED FORMATION OF DENEL ASIA"*. A copy of the letter is annexed to the founding affidavit as "FA2". As appears from the recommendation on page 6 of the letter, the applicant undertook to *"...keep the Department abreast of developments as it progresses and will submit a full PFMA application once the negotiation process including all ancillary agreements (such as the Shareholders Agreement and Licencing Agreement) has been concluded subject to PFMA and other regulatory approvals."* It should be noted that the submission of pre-notifications is an administrative practice that was introduced by the Department of Public Enterprises in order to streamline the consideration of applications under section 54(2). Whilst National Treasury receives copies of these and reviews them, it does not consider these to be formal applications and therefore does not respond formally. It is only once there has been a final submission that the Minister of finance will engage formally with it in line with the provisions of the PFMA.
14. On 23 November 2015, the Minister of Public Enterprises informed the applicant, amongst other things, that the applicant *"...is required to apply and get approval from the Minister of Finance in terms of Section 51(g) of the PFMA, which is a prerequisite when establishing a new entity. Once such approval has been obtained, all the negotiations, agreements and regulatory processes can be completed."* A copy of the letter is annexed hereto marked "LF1".
15. On 9 December 2015, the Department of Public Enterprises held its monthly monitoring committee meeting. Officials from National Treasury were also in attendance. A copy of the minute of that meeting is annexed hereto marked "LF2". I also annex hereto a confirmatory affidavit from Lloyd Ramakobya, marked "LF3" who attended the meeting on behalf of National Treasury and who confirms that "LF2" is an accurate recordal of the meeting. As appears from paragraph 2 of the

SE

LF

minute under the heading "Discussion", National Treasury sought clarity from the applicant on whether the applicant would make an application in terms of section 51(1)(g) of the PFMA or section 54(2) of the PFMA. The applicant responded that the application would be submitted in terms of section 51(1)(g). The applicant was advised to refer to the Practice Note on Applications under section 54 of the PFMA by Public Entities in drawing up its application.

16. The date of 9 December 2015 is also significant because on that day President Zuma removed then Minister of Finance, Mr Nhlanhla Nene, from his position as Minister and head of National Treasury. Former Minister Nene was replaced by Minister Van Rooyen. Minister Van Rooyen remained in this position for four days before he was replaced by former Minister Pravin Gordhan. Former Minister Gordhan occupied the position of Finance Minister until he was removed from the position on 30 March 2017.
17. On 11 December 2015, the applicant submitted its application to then Minister of Finance, Mr Van Rooyen, for the establishment of a joint venture in Hong Kong ("**the application for approval**"). The application for approval was received by the Ministry: Finance on 11 December 2015. A copy of the application for approval is annexed to the founding affidavit as "**FA4.2**".
 - 17.1. The covering letter to the application for approval is signed by the Chairman of the Board of the applicant and is addressed to the then Minister of Finance, D. Van Rooyen. It is headed:

"FORMAL APPLICATION FOR APPROVAL IN TERMS OF SECTION 51(1)(g) OF THE PUBLIC FINANCE MANAGEMENT ACT 1 OF 1999 – PROPOSED ESTABLISHMENT OF DENEL ASIA SOC LIMITED"

- 17.2. The Executive Summary of the application for approval states that the document *"has been prepared in terms of Sections 54(1), 54(2)(a), 54(2)(b) and 54(2)(e)"* of the PFMA.
- 17.3. Clause 5.6 on page 12 of the application for approval states that the applicant concluded that VR Laser Asia, a company incorporated in Hong Kong was a suitable partner to form a joint venture company.
- 17.4. Clause 15 on page 25 of the application for approval sets out the 'Implementation Plan'. It states, amongst other things, that the *"Draft shareholder agreement has been agreed to in principle and awaits Ministerial approval"*.
- 17.5. The recommendation made by the applicant on page 26 of the application for approval states that:

"It is requested that the Honourable Minister notes and approves of Denel's intention to:

1. *establish Denel Asia as joint venture company in Hong Kong which company will facilitate the legitimate securing of contracts in the Asia-Pacific region; and*
2. *establish any further joint ventures, particularly within the India market, to ensure the successful execution of the contracts placed on Denel Asia.*

The Denel Board has approved of such establishment subject to the receipt of the Ministerial approval in terms of section 51(1)(g), section 54(1) and 54(2) of the PFMA."

18. On 27 January 2016 a meeting was held between officials of National Treasury, the applicant and DPE. A copy of a minute of the meeting is attached marked "LF4". I also annex hereto a confirmatory affidavit from Ms Tsholofelo Morotholi, marked

SE

LF-

"LF4 B" who attended the meeting on behalf of the National Treasury and who confirms that "LF4" is an accurate record of what transpired at the meeting. The meeting was one of the regular monthly meetings convened by National Treasury and DPE to monitor Denel as a result of the R1.85 billion government guarantee that has been issued to support the company. At these monthly technical meetings compliance with the guarantee conditions, the financial performance and position of Denel and any other matters that may impact on this position are discussed.

19. At that meeting the parties discussed, *inter alia*, the application by the applicant for approval of the Denel Asia transaction. There was consensus that the application was a complex one. The applicant was informed by National Treasury as well as the DPE that they had concerns about the venture. Some of the issues traversed include:
 - 19.1. The parties agreed that the period of 30 days was inadequate to properly assess the application for PFMA approval;
 - 19.2. The DPE mentioned that the business case was weak;
 - 19.3. National Treasury indicated that they were still processing the application, before submitting it for consideration by the Minister. However they needed additional information in order to complete this process.
20. On 29 January 2016, there were media reports that the applicant had already announced the alleged establishment of the JV saying it had partnered with VR Laser Asia. A copy of one such media report is annexed hereto marked "LF5".
21. A few days later, on 5 February 2016, the Office of the Chief Procurement Officer ("OCP"), which has specific responsibility for ensuring adherence to procurement related legal prescripts, wrote a letter (annexed to the founding affidavit marked "FA5") to the applicant stating that :

SE

L-F-

- 21.1. it was not clear whether government prescripts were complied with when finalising the JV agreement; and
- 21.2. in order for National Treasury to verify compliance with relevant prescripts, the applicant was requested to provide National Treasury with all relevant documents, including, the Minister's approval.

The applicant responded on 10 February 2016 indicating that they are in the process of studying the requirements set out in "FA5" and that they would revert by Friday, 19 February 2016. A copy of this letter is annexed marked "LF6". No response was received by 19 February 2016. Instead on 13 April 2016, the applicant responded by purporting to provide the information sought by the OCP. In relation to approval by the Minister of Finance, the letter stated that "*Section 51(g) of the PFM Act 1 of 1999 further requires that the National Treasury be allowed a **REASONABLE TIME** to submit its decision prior to formal establishment of the joint venture. Section 51(g) read together with section 54(2) defines a reasonable time as 30 days from the date of submission which in this particular case was 11 December 2015, 30 days thus expiring on 11 January 2016. This led to Denel assuming approval by both the Executive Authority as well as National Treasury which then lead to the establishment of the joint venture.*" A copy of the applicant's response is annexed hereto marked "LF7".

22. On 13 April 2016, National Treasury issued a statement that the applicant's application for approval was still being considered by the Minister of Finance and no decision had yet been made. Furthermore, that further information had been requested from the applicant. The statement also outlined the legal prescripts that apply to applications in terms of Section 54 and Section 51 of the PFMA. A copy of the statement is annexed hereto marked "LF8".

SE

LF-

23. At the insistence of National Treasury an urgent meeting took place with the applicant on 15 April 2016. In that meeting Denel confirmed that the JV had been established. National Treasury, represented by the Acting Director General at the time, Deputy Director-General Mr Ismail Momoniat, reiterated Treasury's stance that the Minister of Finance had not granted the requisite approval and that therefore the JV agreement was not valid. At the meeting, the applicant reiterated their interpretation of the PFMA, in line with that captured in the letter of 13 April 2016 and claimed that they had a legal opinion supporting this position. Denel was requested to provide National Treasury with a copy of such legal opinion which they agreed to do, but which has still not been forthcoming. A confirmatory affidavit by Mr Momoniat is annexed marked "LF9".
24. On 18 April 2016, the applicant wrote a letter to National Treasury in terms of which it purported to record elements of the discussion that took place at the meeting of 15 April 2016. A copy of the letter is annexed hereto marked "LF10". This letter included as an attachment a purported recordal of the meeting but which has not been approved as a true reflection of proceedings by both parties. This document is attached to the founding affidavit as "FA10".
25. On 18 April 2016, National Treasury responded to the applicant's letter. A copy of this response is annexed marked "LF11". National Treasury advised the applicant, amongst other things, that:
- 25.1. It would revert on the accuracy of the recordal of the meeting (i.e. "FA10");
 - 25.2. the application for approval was still under consideration and that the required approval from National Treasury had not been granted as yet;
 - 25.3. National Treasury differed with the applicant's interpretation of the law that the applicant could assume that the application was approved after the expiry of 30 days;

SE

LF.

- 25.4. National Treasury is of the view that there was no compliance with the provisions of the PFMA, in particular section 51(1)(g) thereof in that no decision has been taken by National Treasury in terms of the section;
- 25.5. A follow up meeting to determine a way forward should be urgently convened;
- 25.6. In order for National Treasury to properly assess the application for approval, the applicant must submit additional information itemised in paragraph 6 of the letter;
- 25.7. Pending a decision on whether to approve or not, the applicant may not proceed with the JV;
- 25.8. Whilst the application for approval is under consideration, all operations under the JV be ceased with immediate effect pending National Treasury's decision. The aim being to limit the negative consequences which may arise from potential non-compliance with the PFMA.
26. On 19 April 2016, a further meeting was held with the applicant. I attended that meeting in which the applicant was again informed that the approval had not been granted and that further information was needed in order to finalise the application.
27. On 21 April 2016, the applicant sought clarity from National Treasury as regards the additional information National Treasury requested in order to assess the application for approval. A copy of the letter is annexed hereto marked "LF12".
28. On 26 April 2016, I responded on behalf of National Treasury to the applicant's letter providing the clarity which the applicant sought. A copy of the letter is annexed hereto marked "LF13".
- 28.1. I emphasised that most of the information requested is standard in relation to applications of the kind and that the information is intended to enable

SE

LF.

National Treasury to evaluate the likely financial impact of the proposal. The attention of the applicant was once again drawn to the Practice Note on Applications under section 54 of the PFMA by Public Entities. A copy of the practice note is attached marked "LF14".

- 28.2. The information that had been requested was aimed at enabling National Treasury to comprehensively assess the application for approval, including evaluating the financial impact of the proposal, assessing any risks that might arise from the transaction and that appropriate mitigations are in place, and ensuring that there is full compliance with all relevant statutes and regulations. Such an evaluation is especially important in the case of the applicant given the guarantees the South African government has extended to the company to enable it to maintain its going concern status. Several rating agencies have highlighted government's contingent liability exposure to state owned companies as a risk for the sovereign credit rating.
29. The additional information was however not forthcoming from the applicant. Accordingly, on 11 May 2016 I sent the applicant an email informing them that without the additional information, National Treasury will not be in a position to comprehensively assess all aspects of the application before reaching a decision. A copy of the email is annexed hereto marked "LF15".
30. Having still not received the requested information, on 10 June 2016, the Minister of Finance addressed a formal request for information (in terms of section 54 (1) of the PFMA) to the applicant. The Minister of Finance further indicated in the letter that there could be no assumption of deemed approval. A copy of the letter is annexed hereto marked "LF16". In that letter the Minister indicated amongst others that:

SE

LF -

- 30.1. Government wanted to work with Denel to resolve the matter in a way that protects the reputation of Denel as well as Government as a whole;
 - 30.2. This was especially important at a time when the country is under close scrutiny, inter alia, by rating agencies;
 - 30.3. A downgrade in the sovereign credit rating would have negative repercussions for government's capacity to deliver on its objectives to promote growth, development and job creation;
 - 30.4. National Treasury does not agree with Denel's interpretation of the PFMA and detailed the legal basis for disagreeing with Denel's interpretation;
 - 30.5. There was no legal or factual basis to conclude that a 'reasonable time' as contemplated in section 51(1)(g) was no more than 30 days;
 - 30.6. Denel should have contacted National Treasury to ascertain the status of its application rather than assume that approval had been granted.
31. On 28 June 2016, the applicant requested an extension of time within which to respond to the letter dated 26 April 2016. A copy of the applicant's letter is annexed hereto marked "LF18". I granted the extension on 29 June 2016. A copy of this letter is annexed hereto marked "LF 19".
32. The response by the applicant dated 28 June 2016 is annexed to the founding affidavit marked "FA11". In that response the applicant maintains that its interpretation of section 51(1)(g) of the PFMA is correct, but fails to provide further supporting arguments or arguments to counter National Treasury's legal interpretation as outlined in the Minister's letter. It also pointed out that it would provide National Treasury with the additional information requested but that the information was provided not for the purposes of the approval but merely to comply with the request.

SE

LF.

33. As appears from the letter, the applicant states that the applicant's compliance with the relevant provisions of the PFMA has become a question of different legal interpretation of the applicable provisions and that on "*a purposive interpretation of Section 51(1)(g)...in the context of a holistic reading of the PFMA that guidance as to what constitutes a "reasonable time" for the purposes of Section 51(1)(g) is to be found in Section 54(3). This is so, because the event envisaged in Section 51(1)(g) i.e. the formation of a new entity is one which in many circumstances would be subsumed in Section 54(2)*".
34. On 14 July 2016, the applicant addressed a letter to me in terms of which it responded to the request for additional information but stated that in its view, the approval process has been concluded and that the requested information is purely for information purposes and not for any approval process. A copy of the letter is annexed hereto marked "LF20".
35. In considering application, National Treasury had identified a number of key areas of concern, for which the information that had been requested by National Treasury was fundamental to be able to properly assess the application. In this regard the information provided in the application did not comprehensively address all the issues that had been requested by National Treasury. In addition new issues which were emerging, making it difficult to finalise the application.
- 35.1. The applicant has not provided us with any written legal opinion to support their interpretation of the deemed approval.
- 35.2. In its application for approval, the applicant indicated that the establishment of the JV would enable the Denel Group to re-enter the Indian defence market and exploit other defence opportunities in the Asian Pacific region.

SE

L.F.

- 35.3. The applicant initially entered the Indian defence market in 1994. However from 2005, the applicant was effectively blacklisted on allegations of misconduct with regards to its partnerships in the Indian market.
- 35.4. The applicant was fined USD77.3 million for contravention of India's legislation and in 2007 the applicant recognised further losses amounting to USD11 million where the applicant acted as a subcontractor of Rheinmetall, whilst Rheinmetall was blacklisted. The applicant had indicated that the allegations that had resulted in the applicant's blacklisting were thrown out of court and in 2014, it received a note verbale from the Indian Embassy highlighting that the applicant may proceed to conduct business in India again.
- 35.5. In its 2015/2016 Corporate Plan, the applicant had not contemplated entry back into the Asia Pacific market. It is not clear what resulted in the change of heart and no explanation is provided. The applicant has only the importance of the Indian market to the applicant's growth strategy. In the application for approval, the applicant outlined that the Denel Group had explored the Indian market. Local partners were required in order to operate in India. The applicant indicated that they gave consideration to Bharat Forge and Larson and Turbo, however, the applicant indicated that they found that most of the potential partners were already linked to other Original Equipment Manufacturers. Subsequently, VR Laser South Africa approached the applicant to form the JV. The application for approval discusses two potential partners in India: Adani Group and PIPAVAV, both of which are leading Indian conglomerates expanding into the defence industry. It is not clear why these companies were overlooked by the applicant in their review of the market and what led the applicant to the conclusion that VR Laser Asia was the most suitable partner.

SE

L-F.

- 35.6. In the application for approval, the applicant indicated that its contribution to the JV will be in the form of its Intellectual Property, which will enable the applicant to hold a majority shareholding of 51% in the JV. The remaining 49% shall be held by VR Laser Asia via its R100 million contribution which will be made over a period of 5 years (R20 million per annum). VR Laser Asia was to fund its contribution through a shareholder loan from VR Laser South Africa.
- 35.7. Notwithstanding the request, only a high level income statement for the JV has been provided in the application for approval. The cash flow statement provided by the applicant was not comprehensive and was insufficient to allow for a proper analysis. No balance sheet was provided. From the little financial information provided it appears that there will be a significant cash shortfall in the current year 2016/17 and it is not clear how this will be met. The applicant failed to provide the additional required information as per National Treasury's request. Moreover the applicant failed to provide a scenario demonstrating the impact on the performance of the JV should Hong Kong and India fail to conclude a double taxation agreement was also not provided.
- 35.8. According to the application for approval, the Board of the applicant had required the applicant to negotiate a higher amount be paid up front otherwise the matter was to be referred back to the Board. This was to secure financial viability of the JV during the first two years of operation. No indication has been provided of whether such agreements took place and whether there has been any amendment to the timing of the cash injections. In the absence of an amendment, the applicant needs to provide clarity on how the cash shortfall will be met.

SE

LF.

- 35.9. The applicant stated that it will fund the JV with a "preferential and secured loan" of R100 million. Should the JV be unsuccessful the Group may have an incentive to repay VR Laser in order to avoid losing the assets that were used as collateral for the loan or in order to protect their brand. This may worsen the Group's liquidity situation which, according to National Treasury, is fragile.
- 35.10. The applicant in its application for approval states that no funds will be allocated by the Denel Group to the JV. However, the applicant in its exchange control application requested permission from the South African Revenue Bank to make a capital investment in the JV.
- 35.11. The applicant appointed Singania and Partners as well as ENS Africa Forensics to conduct a due diligence on the JV. The reports were included in the application for approval. Key issues which emerge from the reports include, amongst others, the following:
- 35.11.1. VR Laser South Africa is currently in a technically insolvent position. It appears not to be in a position to raise the money required to advance VR Laser Asia so as to enable the establishment of the JV.
- 35.11.2. The last few sets of signed Annual Financial Statements of VR Laser South Africa were issued with qualified audit opinions.
- 35.11.3. VR Laser South Africa funds its business operations and capital commitments through loan financing raised from its shareholders. The shareholders have been identified as politically exposed persons.
- 35.11.4. VR Laser Asia is a shell company that is registered in Hong Kong and is yet to commence trading. ENS Africa held the view that the

statement that "VR Asia has an established network of potential business sources which continue to expand" may be unfounded.

- 35.12. With regard to VR Laser Asia's track record and/or international networks including capacity in assisting the applicant to secure business in Asia, the applicant referred National Treasury to the initial application for approval. No additional information regarding the competitive landscape, business strategy and marketing plan was provided as had been requested.
- 35.13. In conclusion, the analysis of the application for approval highlighted a number of issues which would need to be appropriately resolved before the application could be supported, which included the following:
- 35.13.1. In its 2015/2016 Corporate Plan, the applicant had indicated that it will be pursuing additional capabilities and diversifying its operations with the aim of attaining financial sustainability in the long term. No significant Asian focus was contemplated.
- 35.13.2. There appeared to be no sound basis for selecting VR Laser Asia as a partner;
- 35.13.3. The rationale for establishing a JV in Hong Kong as opposed to other jurisdictions had not been provided.
- 35.13.4. Part of the motivation for the transaction is that it will enable job creation and the advancement of broad-based black economic empowerment in South Africa however, this appeared to be misaligned with India's requirements.
- 35.13.5. The proposal for the applicant to sell products at preferential terms to the JV is not in the best interests of the applicant or Government.

SE

L.F.

35.13.6. There were discrepancies between the PFMA applications and the exchange control application, specifically with respect to the proposal to establish a further company, Denel India, and the requirement for the applicant to contribute funds to the establishment of the JV. No application for the establishment for Denel India had been submitted.

35.13.7. A comprehensive business case and detailed financial projections had not been provided to enable a thorough assessment of the impact of the JV on the applicant's financial positions. However, the information provided indicated that there will be a substantial cash shortfall in the current year.

36. On 24 November 2016, I received a letter from the Acting Group CEO of the applicant providing an undertaking that Denel Asia will remain dormant until such time that the Minister of Finance and the Minister of Public Enterprises have reached consensus and Denel receives an instruction to proceed from the Department of Public Enterprises. A copy of this letter is annexed marked "LF21".

F. THE PFMA

37. As set out above, the applicant submitted an application to National Treasury for approval in terms of section 51(1)(g) of the PFMA for the establishment of the JV.
38. The applicant contends that the application was made not only in terms of section 51(1)(g) of the PFMA but also in terms of section 54(2) of the PFMA.
39. The significance of this contention relates to the time period for approval in respect of the two sections. While section 51(1)(g) of the PFMA provides for a "reasonable period" for approval, section 54(2) (read with section 54(3)) of the PFMA provides

SE

LF-

for approval within 30 days failing which it will be assumed that approval has been given (unless agreed otherwise) by the executive authority.

40. It appears that, instead of bringing two applications: one under section 51(1)(g) of the PFMA and the other under section 54(2), the applicant conflated the two applications and brought one application which was filed under both sections. This notwithstanding the fact that the PFMA envisages two distinct applications which, as demonstrated below, are brought under distinct statutory provisions and directed at different decision-makers. These applications would also elicit separate approvals from the respective Departments.

The section 51(1)(g) process

41. Section 51 of the PFMA provides for the general responsibilities of accounting authorities. Section 51(1)(g) reads as follows:

"51 General responsibilities of accounting authorities

(1) An accounting authority for a public entity-

(g) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; ..."

42. Section 54 of the PFMA provides for the information that needs to be submitted by accounting authorities. Section 54(2) and 54(3) provides that:

"54 Information to be submitted by accounting authorities

...

(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in

SE

L-F

writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

- (a) establishment or participation in the establishment of a company;
 - (b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;
 - (c) acquisition or disposal of a significant shareholding in a company;
 - (d) acquisition or disposal of a significant asset;
 - (e) commencement or cessation of a significant business activity; and
 - (f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.
- (3) A public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms of subsection (2) within 30 days or within a longer period as may be agreed to between itself and the executive authority.
- (4) The executive authority may exempt a public entity listed in Schedule 2 or 3 from subsection (2)."

43. From an ordinary reading of section 51(1)(g) and section 54(2) of the PFMA, it is evident that there are key differences between the two sections. These include the following:

43.1. Section 51(1)(g) falls under the heading "General responsibilities of accounting authorities" and requires that an accounting authority timeously

SE

LF

inform National Treasury on any new entity which it intends to establish and allow National Treasury a reasonable time to submit its decision prior to formal establishment. Section 54(2) on the other hand appears under the heading "Information to be submitted by accounting authorities" and requires that Treasury be informed of the transaction and that the relevant Executive Authority approve the transaction.

- 43.2. It is evident that section 54(2) provides for the oversight role of National Treasury and the relevant executive authority over the relevant institution. This is clearly distinguishable from the role played by National Treasury and the Minister of Finance as the custodians of fiscal policy and public finance management catered for in section 51(1)(g).
- 43.3. Section 51(1)(g) requires that the decision to approve be taken by National Treasury and that National Treasury be given a reasonable time to submit its decision. Section 54(2) on the other hand requires that National Treasury be informed of the decision but provides for the executive authority to approve the transaction.
- 43.4. Section 54(2) read with section 54(3) contains a deeming provision which states that an entity may assume that approval has been given if the entity receives no response from the executive authority within 30 days. In sharp contrast, section 51(1)(g) does not contain such a deeming provision. While it provides that National Treasury has to respond within a reasonable time, it fails to provide that approval must be assumed should Treasury not revert within a reasonable time.
- 43.5. Section 51(1)(g) specifies that National Treasury be allowed a reasonable time to submit its decision. On the other hand, section 54(2), read with section 54(3), expressly provides for a specific time (that is within 30 days) in respect of the executive authority.

SE

LF.

44. Given the key textual differences between section 51(1)(g) and section 54(2), and on application of the *expressio unius est exclusio alterius* principle, the proper interpretation of two sections is the following:

44.1. The specified time period contained in section 54(2) cannot be incorporated into section 51(1)(g) for the following reasons:

44.1.1. This is not consistent with the express language of these provisions; and

44.1.2. This is inconsistent with the clear legislative intention to have a 30 day period apply to section 54(2) and a "reasonable period" apply to section 51(1)(g).

44.2. In any event, even should the 30 day period apply to section 51(1)(g), there is no assumption incorporated into this section that with the effluxion of the prescribed period, approval for the transaction is deemed. Put differently, even should this Court accept that the words "reasonable period" used in section 51(1)(g) should be interpreted as incorporating a 30 day period for consideration by National Treasury (which is denied), there is no provision in the PFMA which provides that on the expiry of this period, approval is assumed. There is no basis in law for this Court to, through an interpretative exercise, introduce such a provision into section 51(1)(g). This would do violence to the language of the PFMA by placing upon it a meaning of which it is not reasonably capable.

What is a 'reasonable period'?

45. What constitutes a *reasonable period* is a question of fact. It is a measure which can be given meaning only within the context of the circumstances which prevail at a point in time. It is thus incorrect for the applicant to seek to impose a rigidity by providing that the reasonable period must be construed as 30 days.

SE

LF.

46. In assessing the reasonableness of the period in question, much depends upon the nature of the particular application, the enquiries that need to be made, the volume of similar applications that needs to be dealt with, the administrative capacity that is available for processing such applications, and other matters of that nature. In the present matter, the following are some of the relevant facts:
- 46.1. On 9 December 2015 (two day before the application for approval was submitted), a new Minister of Finance, Minister Van Rooyen was appointed;
 - 46.2. By 13 December 2015, Minister Van Rooyen was replaced by another Minister;
 - 46.3. As a result thereof, the markets were affected and the Minister of Finance and National Treasury had to concentrate its efforts on restoring market confidence;
 - 46.4. National Treasury closed during the Christmas and New Year period and its staff were on holiday;
 - 46.5. January and February are the busiest months for the Minister of Finance and National Treasury because of the preparations for the Minister's budget speech in the National Assembly which took place on 24 February 2016.
47. In light of the above, a reasonable period could not be assumed to be the 30 day period envisaged in section 54 of the PFMA. In any event, as evident from the correspondence between National Treasury and the applicant, all of National Treasury's concerns relating to the application had not been addressed. Engagement between the parties was therefore ongoing.
48. In these circumstances it is clear that there is no approval from National Treasury under section 51(1)(g). The applicant has therefore not complied with the PFMA in establishing the JV.

SE

LF.

G. THE EFFECT OF THE GOVERNMENT GUARANTEE THAT WAS GIVEN TO THE APPLICANT

49. The applicant has long been experiencing serious liquidity challenges.
50. In light of these challenges, Government support was and continues to be required.
51. In 2012, the applicant requested National Treasury to renew the applicant's R1,85 billion guarantees from Government for a 5 year term.
52. The Minister of Finance concurred to the renewal of the R1,85 billion government guarantee issued to the applicant subject to the following conditions ("**the Guarantee Conditions**"):
- 52.1. National Treasury to approve the terms of the financing raised against the guarantee before any agreements are concluded;
- 52.2. Any transactions undertaken in terms of section 54 of the PFMA to be subject to approval of the Minister of Finance as well as the Minister of Public Enterprises;
- 52.3. The applicant to indicate its strategy for returning the Group to a business that is able to break even without recapitalisation and demonstrate the method gradually reducing its reliance on government support;
- 52.4. The applicant to forward monthly progress reports on the turnaround strategy, deliverables in the implementation of the strategy to the Ministry of Finance, Department of Public Enterprises, Department of Defence and Military Veterans and the Department of Trade and Industry;
- 52.5. A monitoring committee chaired by the Department of Public Enterprises and comprising of National Treasury, Department of Defence and Military Veterans and the Department of Trade and Industry to be established to

SE

LF.

monitor progress on the turnaround of the applicant and implementation of the strategy;

52.6. The Department of Public Enterprises to provide a plan which includes the option of ring fencing/disposing of the Denel Aerostructures as it is the only consistently loss making entity within the Group; and

52.7. The applicant to provide its historical conversion rate in terms of its order pipeline from indicative into firm secure orders as well as the strategies it intends to implement to ensure that the corporate plan targets are met and the mitigation strategies should the desired conversion rates not be achieved.

53. A copy of the letter of guarantee is annexed hereto as "LF22".

54. The effect of the Guarantee Conditions is that the Minister of Finance requires that every transaction undertaken in terms of section 54 of the PFMA must be subject to the approval of the Minister of Finance as well as the Minister of Public Enterprises.

55. This approval which is provided for in the Guarantee Conditions stands distinct from the approvals required under section 51 and section 54 of the PFMA.

56. The Guarantee Conditions qualify the terms of the guarantee and therefore have full legal effect. They create a distinct legal obligation on the applicant to obtain the Minister of Public Enterprises' and the Minister of Finance's approval prior to entering into the types of transactions envisaged in section 54(2) of the PFMA. The implication of this is that:

56.1. Even if the applicant is correct in its interpretation of section 51(1)(g) and Section 54(2) of the PFMA, it still has to obtain approval under the Guarantee. This approval is not subject to any express time bar; and

SE

W.F.

56.2. There is no provision which deems that approval is granted after the lapse of a specified period of time.

57. The legal effect of the Guarantee Condition is the following:

57.1. Section 70 of the PFMA provides for guarantees, indemnities and securities by Cabinet members. Section 70(1) in particular provides that:

"70 Guarantees, indemnities and securities by Cabinet members

(1) A Cabinet member, with the written concurrence of the Minister (given either specifically in each case or generally with regard to a category of cases and subject to any conditions approved by the Minister), may issue a guarantee, indemnity or security which binds-

(a) the National Revenue Fund in respect of a financial commitment incurred or to be incurred by the national executive; or

(b) a national public entity referred to in section 66

(3) (c) in respect of a financial commitment incurred or to be incurred by that public entity."

57.2. Section 1 of the PFMA defines "Minister" as the Minister of Finance.

58. The effect of this is that the conditions qualify the terms of the guarantee and therefore have full legal effect. Moreover, the imposition of conditions by the Minister (referred to in section 70 as the 'approval of conditions') form part and parcel of the decision by the Minister to concur with the issuing of the guarantee. The conditions, once approved by the Minister, qualify the concurrence by the Minister and therefore forms an intrinsic part of the decision to issue the guarantee in terms of section 70(1) of the PFMA.

SE

LF

59. The conditions of the guarantee create a distinct legal obligation on Denel to obtain the Minister's approval prior to entering into the types of transactions envisaged in section 54(2) of the PFMA.

60. The Minister of Finance has not provided the approval envisaged in the Guarantee Conditions. The applicant has therefore failed to comply with the Conditions.

H. THE JV AGREEMENT

61. The JV Agreement contains various suspensive conditions.

62. Clause 4 of the JV Agreement states that the entire agreement (save for the "immediately operative provisions" that is clauses 1, 2, 4 and 28 to 32) is subject to fulfilment of, amongst others, the following suspensive conditions:

62.1. approval under section 51(1)(g) of the PFMA;

62.2. approval under section 54(2) of the PFMA;

62.3. approval under section 66 of the PFMA; and

62.4. The applicant obtaining the relevant approvals required of it from the National Treasury for the execution and implementation of the agreement.

63. I have already set out above that the applicant was required to obtain the approval of National Treasury and the Minister of Finance under

63.1. section 51(1)(g) of the PFMA; and

63.2. the Guarantee Conditions.

64. These approvals were not obtained and hence the conditions set out in the JV Agreement were not fulfilled. The effect of the suspensive conditions is that the operation of the obligations flowing from the contract is suspended pending the occurrence or non-occurrence of the particular specified event. Since the conditions

SE

LF

were not fulfilled, the JV Agreement becomes *void ab initio*. In terms of the JV Agreement, these suspensive conditions may not be waived nor may they be deemed to be fictionally fulfilled.

65. In light of the conditions precedent set out in clause 4 of the JV Agreement, it is evident that these were not met and therefore no valid agreement came into being.

I. RESPONSE TO SPECIFIC AVERMENTS IN THE FOUNDING AFFIDAVIT

66. I now turn to deal with the specific averments in the founding affidavit to the extent necessary. Any factual allegation or legal submission which I do not specifically deal with in this affidavit is deemed to be denied.

67. Ad paragraph 3

As I demonstrate throughout this affidavit, I deny that all the contents of the founding affidavit are true and correct.

68. Ad paragraph 4 to 9

These allegations are noted.

69. Ad paragraph 10

For the reasons demonstrated in this affidavit, I deny that the applicant is entitled to the relief sought.

70. Ad paragraph 11 to 14

These allegations are noted.

71. Ad paragraphs 15 to 16

71.1. The applicant has long been experiencing serious liquidity challenges.

SE

LF.

71.2. In light of these challenges, Government's financial support was and continues to be required.

71.3. In 2012, the applicant requested National Treasury to renew the applicant's R1,85 billion guarantees from Government for a 5 year time. The guarantee was issued by the Minister of Public Enterprises acting with the concurrence of the Minister of Finance.

71.4. The Minister of Finance concurred to the renewal of the issuance of the R1,85 billion government guarantee to the applicant subject to the Guarantee Conditions dealt with earlier in this affidavit.

71.5. Save as is inconsistent with what is stated above, these allegations are admitted.

72. Ad paragraphs 17 to 20

The application for approval of the JV agreement is still being considered by National Treasury. In the circumstances, I can neither confirm nor deny these allegations. In any event, given that this is not a review of a decision by the Minister (or the failure to take a decision) the merits of the application for approval are not relevant. To the extent that it is relevant, I put the applicant to the proof of these allegations.

73. Ad paragraphs 21 to 23

73.1. As indicated above, there was no approval by the Minister for the conclusion of the JV agreement. In any event, the suspensive conditions provided for in the JV agreement were not met. Hence the agreement has not come into force and effect.

73.2. These allegations are accordingly denied.

SE

V-F.

74. Ad paragraphs 24 to 24.12

74.1. On 9 December 2015, the Department of Public Enterprises held its monthly monitoring committee meeting. Officials from National Treasury were also in attendance. As appears from paragraph 2 of the minute ("LF2" hereto) under the heading "Discussion", National Treasury sought clarity from the applicant on:

74.1.1. What rendered the proposed transaction urgent; and

74.1.2. Whether the applicant would make application in terms of section 51(g) of the PFMA or section 54(2) of the PFMA.

74.2. The response from the applicant was that the application would be submitted in terms of section 51(g). The applicant also indicated that the matter was urgent because the deadline for the submission of the RFP/RFPS is due in January 2016 and that there was an opportunity for a major air defence gun contract in an Asian country.

74.3. National Treasury did not agree that the proposed transaction was urgent. It would not have been in a position to do so simply because the application had at that stage not been submitted. The proposed JV transaction has significant financial and governance implications. It is imperative that the matter be properly assessed with due regard to the applicable legal and government prescripts. This weighty process cannot be truncated on tenuous grounds of urgency. The "deemed approval" is denied for the reasons demonstrated elsewhere in this affidavit. The application for approval is still being considered by National Treasury and no approval has been granted.

74.4. Save as aforesaid, these allegations are denied.

SE

LF.

75. Ad paragraph 25

These allegations are denied. The matter was duly considered (and is still being considered) by National Treasury on behalf of the Minister of Finance.

76. Ad paragraph 26

76.1. This is denied.

76.2. As indicated above, on 27 January 2016, officials of National Treasury and DPE met with the applicant's representatives to discuss the application for approval.

76.3. Furthermore, as demonstrated by "FA5" to the founding affidavit, on 5 February 2016 officials from National Treasury expressed disquiet about the applicant's handling of the JV agreement. This letter was in response to media reports on the establishment of Denel Asia. A copy of one such report dated 29 January 2016 is attached marked "LF4".

77. Ad paragraph 27

I deny that the statement was unwarranted and that the allegations are baseless.

78. Ad paragraph 28

While I note that the applicant issued a statement, I dispute the contents thereof.

79. Ad paragraph 29

79.1. At the heart of the concerns raised by Treasury are the interests of the fiscus and the financial viability of the initiative. It is unfathomable how these can be described as "spurious" by the applicant.

79.2. I deny that "FA10" is an accurate record of the meeting.

79.3. The remaining allegations are denied.

SE

L.F.

80. Ad paragraph 30

Save for admitting that "FA11" was sent by the applicant to the Minister on 26 June 2016, the remaining allegations are denied.

81. Ad paragraphs 31 to 34

81.1. I deny the alleged statements were false, misleading and defamatory.

81.2. The remaining allegations are noted.

82. Ad paragraphs 35 and 36

This is denied. The approval has still not been granted. Hence the JV transaction has been concluded illegally.

85. Ad paragraphs 37

Save for stating that any opinion obtained by the respondents is privileged the contents hereof are denied

86. Ad paragraphs 38 to 39

86.1. The allegations that we acted in error or in bad faith are so outrageous that they do not even merit a response.

86.2. Furthermore, as demonstrated above, we have entered into protracted engagement with the applicant in order to obtain sufficient information to enable us to take a decision on the approval application. The correspondence between National Treasury and the applicant bear testimony to the extent to which we have gone in order to be as accommodating as possible in order to resolve this matter. The applicant has however been intransigent in its stance. This notwithstanding the fact that its interpretation of the PFMA is palpably flawed.

86.3. The remaining allegations are denied.

SE

L.F.

87. Ad paragraph 40

87.1. It is correct that the position of National Treasury is that Denel Asia has been established unlawfully in that, in terms of section 51(1)(g) of the PFMA, the applicant is obliged to obtain the approval of National Treasury prior to formally establishing a new entity.

87.2. The implication of this straightforward application of section 51(1)(g) is that while the application for approval is under consideration, the company should be dissolved. The aim behind this is to limit the negative consequences which may arise from potential non-compliance with the PFMA if the requisite approval is not granted and the JV agreement is ultimately set aside.

88. Ad paragraph 41

88.1. National Treasury did not approve the establishment of Denel Asia, any "deadlock breaking mechanism" had to involve the deregistration of this entity at least until the approval process had been completed.

88.2. It is false to claim that National Treasury did not provide assistance to the applicant. On the contrary, National Treasury was actively involved in engaging with the applicant with a view to procuring all the relevant information needed to properly assess the application.

88.3. The remaining allegations are denied.

89. Ad paragraph 42

89.1. The purpose of the meeting held on 17 November 2016 was to discuss the applicant's liquidity challenges relating to the lack of appetite from capital markets on the term note and how National Treasury can assist the applicant.

SE

L-F

89.2. At that meeting, National Treasury was represented by Ms Avril Halstead and two others. Ms Halstead indicated that the position of National Treasury was that it would assist with the road shows and supporting the applicant with obtaining support from investment houses on condition that the applicant unwinds its established Denel Asia joint venture.

89.3. The reasoning behind this was quite simply that the Denel Asia transaction was still in dispute. As National Treasury and Denel were not in accord on this matter, it would be more likely to damage investor confidence and appetite should National Treasury accompany Denel on its road show. Investors were aware of the dispute between National Treasury and Denel regarding the lawfulness of the transaction and would seek clarity on the details of the dispute. It would be unlawful to mislead investors. Unwinding the transaction would ensure that there was no longer a matter a dispute.

90. Ad paragraph 43

This is denied. On one occasion the Minister and I addressed a letter asking to be excused from attending a meeting of the Portfolio Committee on Public Enterprises which was held on 7 September 2016 due to the fact that we were attending the G20 Summit in China with the President therefore did not have time to prepare a presentation for the portfolio committee.

91. Ad paragraphs 44 to 50

91.1. I have explained, at length, the approach adopted by National Treasury to the establishment of Denel Asia and the rationale for this approach. I deny that our approach is 'regrettable' or in any way untoward.

91.2. We have self-evidently acted in strict compliance with the Constitution and the PFMA.

SE

LF.

91.3. The remaining allegations are denied.

92. Ad paragraph 51

- 92.1. The parallel drawn by the applicant between the Tawazun transaction and the present one is unfortunate and misleading. It is false to claim that there was no response from National Treasury to the Tawazun transaction. As demonstrated below, the interaction between National Treasury and the applicant lasted for well over six months after the application for approval was filed.
- 92.2. The Tawazun transaction was an application by the applicant for the establishment of a new company ("Newco") in the United Arab Emirates and acquisition of a 49% shareholding in Newco. This application was received by the Minister of Finance on 19 December 2011.
- 92.3. On 9 February 2012, a meeting was held between the applicant, National Treasury and the Department of Public Enterprises to clarify issues relating to the transaction. One of the officials representing National Treasury at the meeting was Ms Leona Mlauli. A confirmatory affidavit from Ms Mlauli is annexed marked "LF23".
- 92.4. In March 2012, there were email exchanges between Ms Mlauli from National Treasury and representatives of the applicant regarding the Tawazun transaction. A copy hereof is attached marked "LF24". As is evident from the attached emails, National Treasury was still considering the application and sought further clarification on the enforcement of call and put options under UAE law.
- 92.5. A second meeting took place on 12 April 2012 to address additional legal issues. Ms Mlauli was one of the representatives of National Treasury who attended the meeting. The details of the issues discussed are intricate. In

SE

LF.

order to avoid prolixity I do not intend to burden this Court with this extraneous information. However, should the applicant dispute this, National Treasury will apply for leave to place these facts before this Court.

92.6. By June 2012, following a cabinet reshuffle, the Minister of Defence had not yet approved the transaction. Similarly, the Minister of Finance was still considering the application for approval. At this stage, there was ongoing engagement between National Treasury (represented by Ms Mlauli and others) and the applicant on the Tawazun application. Copies of emails which demonstrate this are attached marked "LF25". As is evident from these emails, the engagement between the applicant and National Treasury was still ongoing in June 2012. By that stage the Minister had not yet taken a decision to approve the transaction.

92.7. After a process of engagement that spanned a period of over six months, all of the concerns raised by National Treasury had been addressed by the applicant. The applicant was well aware that there were no remaining concerns and that queries had been adequately addressed.

92.8. In any event, the Tawazun transaction differed substantially from the transaction at hand. In that transaction:

92.8.1. The applicant gave an indication that the bank facilities amounting to USD 173 million for phase 1 in the joint venture was secured. This was included in Denel Dynamics Plan for 2012/2013.

92.8.2. The applicant indicated that its financial exposure to the joint venture is capped as there is no on-going obligation from the Group to fund the business.

92.8.3. There are no negative tax implications.

SE

LF.

92.8.4. The applicant provided financial statements and the financial impact of phase 1 in the Denel Dynamics Plan.

92.8.5. The Denel Group indicated that it had carried out all the commercial, technical, operational and legal aspects pertaining to the applicant's participation in the JV.

92.8.6. The applicant indicated that the transaction would assist in creating jobs. An estimated number of 40 positions would be created within Denel Dynamics.

92.9. In the current transaction on the other hand:

92.9.1. The applicant was required to seek approval from both the Minister of Finance and Minister of Public Enterprises in terms of the Guarantee Conditions.

92.9.2. The applicant indicated that its contribution to the JV will be in the form of its Intellectual Property which will enable the applicant to hold a majority shareholding of 51% in the JV. The remaining 49% was to be held by VR Laser Asia via its R 100 million contribution, which will be made over a period of 5 years (R 20 million per annum). VR Laser Asia was to fund its contribution through a loan from its shareholder company, VR Laser South Africa. However, VR Laser South Africa's ability to advance the loan to VR Laser Asia is questionable as the due diligence reports conducted by Singania and Partners as well as ENS Africa Forensics on the JV indicated that VR Laser South Africa is technically insolvent in that the company's liabilities exceed its assets by approximately R 22 million.

92.9.3. The Board of the applicant, in its approval of the transaction, had required the applicant to negotiate a higher amount to be paid up

SE

L-F-

front otherwise the matter was to be referred back to the Board. This was to secure the financial viability of the JV during the first two years of operation. No indication has been provided by the applicant when requested to do so on whether such engagements took place and whether there has been any amendment to the timing of the cash injections.

- 92.9.4. The applicant clearly states in its application for approval that no funds will be allocated by the Denel Group to the JV. However, the applicant in its exchange control application has requested permission from the South African Reserve Bank to make a capital investment in the JV. The applicant requested permission to make capital investments as a start-up capital for the JV and Denel India. This contradicts what the applicant had communicated to National Treasury in the application for approval.
- 92.9.5. The applicant in the application for approval indicates that there were discussions underway between India and Hong Kong with respect to a double tax agreement. The applicant further pointed out that the lack of a double tax agreement is outweighed by the lucrative opportunities that can be realised in India. The applicant was requested to provide a scenario illustrating the impact on the performance of the JV should no double tax treaty be agreed to. The applicant failed to provide this information.
- 92.9.6. The applicant provided a snap shot Income Statement and demonstrated a cash flow impact, which National Treasury did not view as comprehensive to enable a thorough assessment of the impact of the JV on the applicant's financial position. From the little financial information that was provided, National Treasury

SE

LF

found that there will be a substantial cash shortfall in the current year.

92.9.7. The due diligence reports attached to the application for approval revealed a number of concerns.

92.9.8. The motivation that the transaction will enable job creation and the advancement of broad-based black economic empowerment in South Africa appears to be misaligned with the India's requirements which require that 30% on a cost basis be manufactured in India as per the Defence Procurement Procedures undertaken by its Minister of Defence in India.

92.10. Hence Tawazun is distinguishable from the present matter.

92.11. The remaining allegations are denied.

93. Ad paragraph 52

93.1. I deny that there is a "personal public dispute" between National Treasury and any entity associated with the Gupta family. In terms of section 216 of the Constitution, National Treasury has a crucial constitutional role to play in ensuring both transparency and expenditure control in state entities. National Treasury also has the constitutionally assigned function of ensuring compliance by state entities and state owned entities with the PFMA. has tried, unsuccessfully, to resolve this matter.

93.2. Furthermore, in terms of section 6 of the PFMA, National Treasury is statutorily obliged to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of entities like the applicant and to enforce compliance with the PFMA.

93.3. National Treasury's handling of the application for approval is strictly in compliance with applicable statutory and government prescripts. In view

SE

LF.

hereof, it is an indictment on the applicant and its business dealings that it perceives the enforcement of the law as an attack on a particular family or an associate company.

94. Ad paragraph 53

I reject these spurious allegations. The applicant seems determined to personalise this dispute instead of focussing on ensuring that the constitution and the law is upheld and that decisions are made in a lawful manner in the interests of Denel as an entity and the country as a whole.

95. Ad paragraphs 54 to 60

95.1. If the applicant has suffered any adverse reputational consequences, then this is as a result of its unlawful conduct in establishing Denel Asia without the requisite Ministerial approval.

95.2. Regrettably, the current application is bound to aggravate the situation in that it exposes the applicant's flawed interpretation of the applicable statutory and governance regime.

95.3. The remaining allegations are denied.

96. Ad paragraphs 61 to 67

96.1. I have already dealt with the allegations in this paragraph. The application for approval has not been finalised because the applicant has failed to furnish all the information needed to do so.

96.2. These allegations are accordingly denied.

97. Ad paragraphs 68 and 69

The allegations contained in these paragraphs have already been dealt with. They are denied.

SE

C.F.

98. Ad paragraphs 70 to 73

Any alleged prejudice the applicant has suffered is of the applicant's own making. It has unlawfully proceeded to establish Denel Asia in the absence of the required Ministerial consent.

- 98.1. The allegations that National Treasury and/or the erstwhile Minister have acted for improper motives is scandalous and devoid of any truth. As I have been at pains to demonstrate, the handling of this approval application was done in strict compliance with the law. It bears repeating that the purpose of ensuring compliance with the PFMA is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the PFMA applies.
- 98.2. National Treasury is responsible for managing South Africa's national government finances. The Constitution of the Republic of South Africa mandates National Treasury to ensure transparency, accountability and sound financial controls in the management of public finances.
- 98.3. My responsibility as the Director-General of National Treasury includes managing government's financial assets and liabilities, overseeing government accounting policies and standards, regulating public sector procurement through policy formulation, developing appropriate fiscal policy and financial management, and improving financial management throughout government.
- 98.4. National Treasury is therefore statutorily obliged to rigorously scrutinise the application in order to ascertain that it is sound. Any allegation of malfeasance on the part of the former Minister of Finance and National Treasury officials is unwarranted.

SE

LF

98.5. For the reasons set out in this affidavit this Court should not grant the relief sought. In any event -


98.5.1. The applicant has not made out a case for a declaratory order;

98.5.2. The applicant's interpretation of the legislation is implausible. It requires that this Court read words into section 51(1)(g) of the PFMA. This is not permissible in the absence of a declaration of constitutional invalidity; and

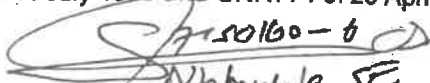
98.5.3. This Court should be slow to prevent National Treasury from properly carrying out its vital constitutional and statutory functions.

J. CONCLUSION

99. For all these reasons, I submit that the application falls to be dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.


LUNGISA FUZILE

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to at Pretoria on this 11 day of May 2017 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.


Sibusiso E Nhlauhla SE



COMMISSIONER OF OATHS

Name: Sibusiso E Nhlauhla

Address: 231 Pretorius street

Capacity: Constable